No. 22452

United States
COURT OF APPEALS
for the Ninth Circuit

Carpenters Local 1273 of the United Brotherhood of Carpenters and Joiners of America, Construction General Laborers Local 85, Lane-Coos-Curry-Douglas Counties Building and Construction Trades Council, Oregon State Council of the United Brotherhood of Carpenters and Joiners of America,

Appellants,

v.

Willis A. Hill, doing business as Willis A. Hill, General Contractor,

Appellee.

APPELLANTS' REPLY BRIEF

On Appeal from the United States District Court for the District of Oregon

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REPLY TO APPELLEE'S SUPPLEMENTAL STATEMENT OF THE CASE

Appellants accept appellee's supplemental statement of the case with the following exception: Appellee states (Ans. Br. 3)[1] that appellant, Lane-Coos-

[1] Op. Br. refers to Appellants' Opening Brief.
Ans. Br. refers to Appellee's Answering Brief.
Cr. refers to Clerk's Record.
Cr. S. refers to Clerk's Supplemental Record.
Tr. refers to Reporter's Transcipt.

Curry-Douglas Counties Building and Construction Trades Council's picket signs were untrue in stating that working conditions were inferior to those enjoyed by union members. To the extent that union member employees of employers other than the appellee herein enjoyed the benefits of the Articles of Agreement (Jt. Ex. 1) relating to the contracting and subcontracting of work at construction sites, working conditions were in fact inferior to those enjoyed by other union members.

ARGUMENT

I

The Trial Court's Findings of Fact and Conclusions of Law Failed to Meet the Requirements of Rule 52(a).

Appellee's answering brief in no way weakens or controverts the established principle that in order to comply with Rule 52(a) trial courts must make those pertinent, subsidiary findings of fact which provide the basis for ultimate conclusions and decisions they reach. *Kruger* v. *Purcell*, 300 F.2d 830 (3d Cir. 1962), *Kweskin* v. *Finklestein*, 223 F.2d 677 (7th Cir. 1955). The trial court in the instant case failed to make any subsidiary findings, much less findings of some pertinence or relevance. (See Op. Br. 8-9 for full discussion.)

Appellants find no disagreement with this Court's interpretation of Rule 52(a) cited by appellee (Ans. Br. 14) where it stated:

> "The ultimate test as to the adequacy of findings will always be whether they are sufficiently

> comprehensive and pertinent to the issues to provide a basis for decision and whether they are supported by the evidence . . . ." *Carr* v. *Yokahama Specie Bank, Limited*, 200 F.2d 251, 255 (9th Cir. 1952)

The question before the Court here is not so much as to the adequacy of subsidiary findings actually made, but more as to the fact that no such findings were made. The trial judge's findings that the Articles of Agreement (St. Ex. 1) violated Sec. 8(e) and that appellants' picketing violated Sec. 8(b)(4)(i)(ii)(A) were general and conclusory, unsupported by any subsidiary findings. Secondly, he failed to provide any findings establishing basis or support for his lump sum award of damages.

Contrary to appellee's assertion (Ans. Br. 16-17), the trial court here did precisely what the court prohibited and determined to be violative of Rule 52(a) in *Smith* v. *Dental Products Co.*, 168 F.2d 516 (7th Cir. 1948). In *Smith*, the trial court entered a lump sum judgment for $60,000 as lost profits and damages without subsidiary findings of fact or conclusions of law. On appeal, the Seventh Circuit Court ruled that the requirements of Rule 52(a) were mandatory and obligated the trial court to make such subsidiary findings of fact as would provide a basis for its ultimate conclusion as to damages. Whatever may have been the reason in *Smith* for the court's failure to make any subsidiary findings, the significant fact on which the decision turned was that none

were made. As in the instant case, the lack of sufficient findings to establish a basis in *Smith* for the total damage award violated the binding requirements of Rule 52(a).

Alexander v. *Nash-Kelvinator*, 251 F.2d 187 (2d Cir. 1958) is on all fours with the present case. There the trial court, in an action involving personal injury and property damage, awarded judgments to two plaintiffs in the lump sum, blanket amount of $65,000 and $45,000. The Court of Appeals ruled this did not meet the requirement of Rule 52(a) because the trial court had failed to show the amount of the items of damage such as hospital bills, medical expenses, loss of consortium, pain and suffering, etc., which went to make up the total award.[2] The Court held that it must have this breakdown to show the bases or theory used by the trial court to arrive at the total award in order to adequately review the case. In addition, the appellant was held entitled to this breakdown in order to fully exercise his right of appellate review.

Likewise, in the instant case, the lump sum award by the trial court had to have been made up of several diverse elements (see brief on damages, Cr. S. 47-95), none of which were enumerated in the findings of fact and conclusions of law. Appellate courts

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[2] Appellee's attempt to differentiate the decision in *Hataley* v. *United States*, 351 U.S. 173, 76 S. Ct. 745 (1956) (See Ans. Br. pp. 15-16) creates at best a distinction without a difference. Whether the problem is enumeration of subsidiary facts supporting an award of damages to an individual or allocation between several individuals, the general principle enunciated is equally as important and pertinent.

have neither the power, nor should they be required to search the record or review the evidence to supply the facts necessary to determine the issues of a case. *Woods Construction Co.* v. *Pool Construction Co.*, 314 F.2d 405 (10th Cir. 1963).[3]

The cases of *United States* v. *Pendergrast*, 241 F.2d 687 (4th Cir. 1957) and *Summerbell* v. *Elgin Nat. Watch Co.*, 215 F.2d 323 (D.C. Cir. 1954) cited in appellee's answering brief, page 17, do not support his case. In *Summerbell*, the trial court had issued the following as part of its findings of fact and conconclusions of law:

> "Considering what the record shows he did, his education, his experience, his contacts, and the amount of time expended on this class of activity, his past earnings, the amount of the retainer in connection with the other products, and the usefulness of his services, I am of the opinion that their fair and reasonable value is $5,000." *Summerbell* v. *Elgin Nat. Watch Co.*, supra at p. 324.

In essence, it had provided the appellant and the appellate court with the subsidiary facts that were the basis for its determination that the fair and rea-

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[3] Appellee's assertion that the *Woods Construction case* is not applicable is without foundation. While that case certainly involved insufficient findings on a question of liability and not damages, Rule 52(a) applies both to questions of liability and damages. Decisions on both must be supported by sufficient subsidiary findings under Rule 52(a). *United States* v. *Horsfall*, 270 F.2d 107 (10th Cir. 1959). In any event, appellants are appealing this matter for the trial court's failure to make findings as to liability (supra, p. 3 and Op. Br. 14) as well as for its failure to make sufficient findings as to damages.

sonable value of certain services was $5,000. In the instant case, the trial court found only that,

> "As a direct and proximate result of the actions of defendants as above described, plaintiff has been damaged in the amount of $11,-500.00." (Cr. pp. 13-14)

No subsidiary facts were enumerated to support this award.

In *United States* v. *Pendergrast*, 241 F.2d 687 (4th Cir. 1957), the court principally ruled that regardless of any insufficiency in the findings and conclusions of the trial court, the error was waived by the government's failure to request more specific findings at the time motion was made for a new trial on the ground that the damages awarded were excessive. The court there went on to say in what must be considered dictum to the principal decision that more specific findings would not aid the court under the facts of that case in determining the correctness of the trial court's ruling.

That may well have been the case in *Pendergrast*, but here the issues, particularly those relating to alleged damages, were of a highly complex and technical nature. While appellee's counsel may choose to deny the fact now (Ans. Br. 14), his previous actions, as well as those of the appellant's counsel, in calling expert witnesses, placing numerous exhibits relating to the issue of damages into evidence and submitting extensive briefs to the trial court belie any such claim. Where expert witnesses are at variance in

their testimony (see Tr. 216-248, 261-286) and the issues are difficult, it is more imperative than ever that the appellate court have the benefit of comprehensive and pertinent facts on which the trial judge relied for support of his findings and conclusions. *United States* v. *Merz*, 306 F.2d 39 (10th Cir. 1962) (dictum) rev'd. on other grounds, 376 U.S. 192, 84 S. Ct. 639 (1964); *Hazeltine Corp.* v. *Crosley Corp.*, 130 F.2d 344 (6th Cir. 1942).

II

There is No Basis in the Record for the Trial Court's Finding and Conclusion That Appellants' Picketing was Unlawful.

Appellee's answering brief makes it clear he completely misunderstands the thrust and direction of appellants' argument. While a fair reading of the Oregon State Building and Construction Trades Council Articles of Agreement (Jt. Ex. 1) in its entirety establishes that it is limited to job site matters, even if it is read in a narrower and more restricted fashion, it is susceptible of a valid and legal construction which should be given to it under prevailing federal case law concerning contract interpretation. (See Op. Br. pp. 13-17 for full discussion of this point) *Newport News, Shipbuilding & Drydock Co.* v. *United States*, 226 F.2d 137 (4th Cir. 1955); *American Machine & Metals Inc.* v. *DeBothezat Impeller Co.*, 180 F.2d 342 (2d Cir. 1950). Appellee nowhere disagrees with the validity or appropriateness of this legal prin-

ciple. Furthermore, the Articles of Agreement, valid and legal both by their terms and on their face under appropriate rules of contract interpretation are not made any less so because they do not contain provisions expressly prohibiting the possibility of illegal action. *NLRB* v. *Mountain Pacific Chap., AGC,* 270 F.2d 425 (9th Cir. 1959). Appellants need not negate every remote and slight possibility that the Articles of Agreement might be in effect when some illegal act occurs in the distant future.

By reference to *Mountain Pacific Chap.*, appellants are not throwing motivation into the hopper, as the appellee would assert (Ans. Br. pp. 7-8). The above rule, enunciated by this Court, was applied in testing the contract in *Mountain Pacific Chap.* "by its terms" and before ever reaching the question as to its motivation or intent.

The Articles of Agreement, tested by their terms, are valid and legal, and appellants do not object to the propositon that they be examined in this light. If, however, as would be appropriate under Los Angeles Building and Construction Trades Council, 151 NLRB 83, 1965 C.C.H. NLRB 9191, the Articles of Agreement are examined for legality through Sec. 8(e) of the Labor-Management Relations Act, as amended (29 U.S.C. Sec. 158(e)) by reference to the motivation and intent behind their adoption and application, it will certanly be concluded that the record of ths case nowhere supports a finding that they be applied otherwise than in a legal manner.

It is amazing to appellants that appellee would contend that all the court and board decisions set out in its string of citations at pages four and five of appellee's answering brief support and properly establish that appellants' picketing was in violaton of Sec. 8(b)(4)(i)(ii)(A) of the Labor-Management Relations Act, as amended (29 U.S.C. Sec. 158 (b)(4)(i)(ii)(A)). Examining particularly the court decisions cited, it is to be noted that three of them (*Drivers Local* 695 v. *NLRB*, 361 F.2d 547 (D.C. Cir. 1966); *NLRB* v. *Teamsters Local* 294, 342 F.2d 18 (2d Cir. 1965); and *Teamsters Local* 413 v. *NLRB*, 334 F.2d 539 (D.C. Cir. 1964)) involve the legality of subcontracting clauses applicable to over-the-road and short-haul truckers, in some instances relating to employees having no connection with the building and construction industry. Those cases are entirely irrelevant to an analysis of the Oregon State Council Articles of Agreement (Jt. Ex. 1), which relates solely to the contracting and subcontracting of work to be performed at a job site by employers in the construction industry. The remaning court decision (*NLRB* v. *Carpenters, AFL-CIO*, 382 F.2d 593 (9th Cir. 1967) and the Board decisions cited which appellee asserts should bear on the decision of the instant case completely fail to take into account the applicable rules of contract interpretation set forth above and in appellants' opening brief (Op. Br. 13-17).

Appellants respectfully and strongly urge that

this Court re-examine its holding in *NLRB* v. *Carpenters, AFL-CIO*, supra, as well as its affirmation of the Board ruling in *NLRB* v. *Lane-Coos-Curry-Douglas B. T. C., No.* 20,783, 9th Cir., August 9, 1967, and adopt the rule of reason and fairness in contract interpretation which appellants support and which has consistently been upheld by federal case law. If read in their entirety, the Articles of Agreement, in their provisons relating to subcontracting of work and picketing, are limited to situations involving work to be done at construction job sites. But even if construed in a narrower fashion, their language is subject to a legal and valid interpretaton, which should appropriately be adopted by this Court. The Articles of Agreement are within the construction industry proviso to Sec. 8(e) and picketing to obtain their execution did not violate Sec. 8(b)(4)(i)(ii)(A). *Carpenters, Local* 383 v. *NLRB*, 323 F.2d 422 (9th Cir. 1963).

III

The Record and Evidence Fail to Support the Trial Court's Award of Damages.

Appellants and appellee are in agreement that the proper method of accounting for purposes of determining the existence or non-existence of lost profit as an element of damages is on an accrual basis. (See testimony of expert witnesses called by both parties, Tr. 226-231, 261-264). Use of the accrual method, as opposed to the cash basis asserted by appellee,

even in the face of his own expert's testimony, results in an entirely different computation of any alleged lost profit and establishes beyond doubt, or certainly by a preponderance of the evidence, that no such damages exist. (See Defendants' Brief on Damages, Cr. S. 66-70).

Appellee's assertion, relying on the testimony of his accountant, that use of the cash or accrual system will lead to the same result (Ans. Br. 10) is precisely contrary to the evidence in the record. The appellee's accountant testified that he had used only money actually received in his computations when comparing the two systems and did not include billings made by the appellee to others (Tr. 245-246). His testimony is entirely inaccurate as to what the appellee's books showed on an accrual basis. It should not be relied on or given any weight by this Court or the trial judge.

Secondly, with the possible exception of $519.18 relating to increases in wage rates, defendants' brief on damages (Cr. S. 61-78) clearly displays the fallacious quality of appellee's claim of damages for general overhead, job overhead and critical path analysis. Those elements are simply non-existent.

Appellee's allegation that appellants concede damages in a larger amount than that awarded by the trial court (Ans. Br. 10) shows only that he fails to understand or wishes to ignore the appellants' basic contentions. Both here (Op. Br. 17-18) and before the trial court (Defendants' Brief on Dam-

ages, Cr. S. 61-78) appellants have, by clear and convincing evidence, shown that appellee is entitled to nothing by way of damages. Appellants have no quarrel with appellee's theory that damages, once proven, need not be computed with mathematical certainty (Ans. Br. 8-9), but this theory does not excuse the appellee from the burden of proving initially the existence of damages, regardless of their mathematical computation. It is this burden which the appellee has failed to carry.

Due to the trial court's failure to comply with the requirement of Rule 52(a) it is impossible for the appellants to discover what erroneous reasoning the trial court applied in arriving at a damage award. What is certain is that an examination of the record and the use of proper accounting procedures show the award to be without basis or support.

CONCLUSION

For the reasons set forth, both here and in Appellants' Opening Brief, it is respectfully submitted that this case be remanded to the trial court with the direction that findings of fact and conclusions of law be entered in conformity with Rule 52(a) of the Federal Rules of Civil Procedure.

In the alternative, if this Court does not see fit to remand the case on the above ground, it is respectfully submitted that the trial court's finding that defendant-appellants' picketing was in violation of law be reversed and its assessment of damages be va-

cated as unsupported by the record or that the case be remanded for a proper assessment of damages, if any, in conformity with the evidence.

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circut, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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